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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 133

NORTON COMPANY, A CORPORATION,
Petitioner,

vs.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Supreme Court of Illinois (R. 95) is reported in 405 Ill. 314, 90 N. E. (2d) 737 (1950).

Jurisdiction

The decision of the Supreme Court of Illinois became final March 20, 1950 (R. 109). The petition for a writ of certiorari was filed June 15, 1950, and was granted October 9, 1950 (R. 110). The jurisdiction of this Court rests on § 1257(3) of Title 28, United States Code, as amended by the Act of June 25, 1948, c. 646, 62 Stat. 929.

Questions Presented

1. Is the Illinois Retailers' Occupation Tax unconstitutional as applied to gross receipts from sales made by petitioner, a Massachusetts corporation, under circumstances where the orders are accepted by petitioner in Massachusetts, the goods are manufactured by petitioner in Massachusetts, and are shipped by petitioner from Massachusetts, f. o. b. Worcester, to customers in Illinois?

2. May the State of Illinois impose its Retailers' Occupation Tax on a Massachusetts corporation for the privilege of doing an interstate business, merely because the Company also does an intrastate business in Illinois upon which it pays such privilege tax to Illinois?

3. Does the Illinois Retailers' Occupation Tax violate the Commerce Clause by discriminating against some interstate sales in favor of others?

Specifications of Error

The Supreme Court of Illinois erred:

1. In declining to follow the principles established by this Court in many cases in which the states have been denied the right to tax the privilege or occupation of engaging in interstate commerce.

2. In holding that the State of Illinois may tax the privilege of engaging in interstate business by a foreign corporation which also did an intrastate business in Illinois upon which it paid a privilege tax levied by that state.

3. In holding that the Illinois Retailers' Occupation Tax Act, now construed as applying to the interstate business of petitioner, is not repugnant to the Commerce Clause of the Federal Constitution.

Statute Involved

The statute involved is the Illinois Retailers' Occupation Tax Act, approved June 28, 1933 (Ill. Laws 1933, p. 924), as amended by the Act of May 29, 1941 (Ill. Laws 1941, Vol. 1, p. 1079; Ill. Rev. Stat. 1941, chap. 120, par. 440 et seq.). Section 2 of the Act, which is directly involved in this case, is as follows:

> "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States be made the subject of taxation by this State."

Other pertinent sections of the Act are set forth in the Appendix hereto.

Statement

Petitioner, a Massachusetts corporation, filed its complaint in the Circuit Court of Sangamon County, Illinois, to review respondent's disallowance of a claim for credit in the amount of $96,581.90, representing taxes collected from petitioner under the Illinois Retailers' Occupation Tax Act with respect to certain sales made by petitioner under circumstances where the orders were accepted by petitioner in Massachusetts, the goods were manufactured by petitioner in Massachusetts, and were shipped by petitioner from Massachusetts, f.o.b. Worcester, Massachusetts, to customers in Illinois (R. 1-3).

In its complaint petitioner alleged that respondent's de-

cision, disallowing the claim, was contrary to the provisions of the Illinois Retailers' Occupation Tax Act and violated the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States (R. 2). The Circuit Court rendered judgment for respondent (R. 4). On appeal the Supreme Court of Illinois affirmed the judgment (R. 101), holding that the Illinois tax applied to the sales in question, which were admittedly interstate transactions (R. 97), and that as so applied it was constitutional (R. 95-101). The detailed facts are as follows:

Petitioner is incorporated under the laws of Massachusetts. It manufactures and sells grinding wheels, abrasive products and grinding machines. Its plant and main office are at Worcester, Massachusetts (R. 9), where the general ledgers, books, records and invoices are kept and collections are made. It manufactures approximately 225,000 items, and since some items are sold repeatedly, it keeps approximately 18,000 items on hand in its inventory at Worcester (R. 14).

It is authorized as a foreign corporation to do business in the State of Illinois and maintains an office and warehouse in Chicago (R. 9) where it keeps on hand an inventory of approximately 3,000 items (R. 14).

Petitioner does not employ salesmen and has no one soliciting business in Illinois. It does maintain a corps of abrasive engineers who are sent to Illinois to consult with and advise manufacturers, on request, concerning the technical problems the manufacturer may have in the use of grinding wheels and abrasives. These engineers do not solicit orders nor do they take orders (R. 20).

The claim in controversy relates solely to taxes paid on sales of merchandise under orders which were accepted in Massachusetts for goods manufactured in Massachusetts and shipped from Massachusetts to Illinois customers in

interstate commerce. No part of the claim relates to orders accepted in Illinois or to sales made from merchandise in inventory in Illinois (R. 25).

The orders which were the basis of this claim were received by mail, some at Chicago (R. 47) and some at Worcester (R. 73). If received at Chicago they were sent to Worcester for acceptance or rejection. 15 or 20 bags of mail received each day at Worcester brought orders from the 48 states and foreign countries (R. 80). All such orders were accepted or rejected at Worcester and notification was sent from Worcester to the customer. Upon acceptance of an order the articles ordered were either taken from inventory on hand at Worcester or were manufactured to meet specifications. The goods were then shipped from Worcester to the customer.

A complete credit department in charge of an experienced credit manager was maintained at Worcester, which department checked for credit all orders received at Worcester, whether originally sent through Chicago or direct to Worcester. The credit department had full files on each customer which it kept current (R. 73). The Chicago office had only a card list showing the names of persons whose credit Worcester approved, and which was used only in connection with orders which Chicago could fill (R. 47-48).

After an order coming to Worcester was returned from the credit department with credit approved it was then sent to the editing department which determined whether the specifications were sufficient (R. 71). After it was edited it was examined for inventory on hand at Worcester (R. 76). Of the 225,000 different items manufactured, only 18,000 were in inventory (R. 14). If the merchandise was not in inventory, engineers determined whether the article could feasibly be manufactured, whether material was available and when delivery could be made. A manufacturing check

was then prepared containing instructions as to speeds, specifications, size, etc., and instructions were sent to the various departments showing how and when the articles were to be manufactured, when they were to be shipped, and the price and terms at which they were to be billed (R. 76).

As to all of the orders here in question, the goods were shipped from Worcester to the Illinois customers, f.o.b. Worcester, and all invoices so indicated (R. 34). All invoices were sent from Worcester to the Illinois customers. All invoices were payable at Worcester (R. 64). Some of the goods were shipped directly to the customer. Some of the goods were shipped to the customer via the Chicago warehouse, because usually the box cars carrying inventory to the Chicago warehouse were not filled and space was available for additional merchandise. The use of this space for packages addressed to Illinois customers resulted in a saving of transportation costs. The merchandise for the customers was packed and wrapped in boxes or kegs and each package contained on the outside a memorandum showing the name of the customer, the address of the customer and instructions to the Chicago warehouse as to how it was to forward the package to the customers. Upon receipt of such a carload shipment Chicago had no discretion in determining how the packages addressed to the customers were to be delivered. The Chicago warehouse merely forwarded the unopened packages in accordance with the instructions placed on the packages at Worcester (R. 12).

The Chicago office had authority to accept orders only (1) if the merchandise was on hand at Chicago, and, (2) if the customer's name appeared on the approved credit list furnished by Worcester to Chicago (R. 33). If the merchandise was on hand at Chicago and the customer was on the approved credit list which had been furnished by Worcester, the Chicago office accepted the order and delivered the

merchandise and it became an Illinois sale and the Illinois tax was paid thereon. No part of petitioner's claim for credit is based on sales of this kind (R. 25).

If the order could not be accepted at Chicago because the merchandise was not on hand at Chicago or the customer was not on the approved credit list, the Chicago office had no authority to accept or to reject the order. The only authority the Chicago office had with respect to such an order was to forward it to Worcester for acceptance or rejection. Such orders sent to Worcester were sent without recommendation (R. 21).

As to such orders, the Chicago office would not have the necessary information to determine whether the orders could or would be accepted by Worcester. It had no information as to what Worcester had in inventory and did not have the information necessary to determine whether or when Worcester would manufacture articles not in inventory (R. 80).

There were occasions every day when Worcester would reject orders forwarded by the Chicago office because the specifications might not be clear, the merchandise could not be manufactured, or the material was not available, or the safety engineers might not consider the specifications safe, or it would be impractical to manufacture the articles ordered or because of patent requirements as well as for credit reasons (R. 49-50).

In addition to the foregoing, there were orders received at Chicago for merchandise some but not all of which was on hand there. The practice followed was for Chicago to accept the order as to the merchandise on hand and indicate on the order how much of the merchandise it shipped. The balance of the order was then sent to Worcester for acceptance or rejection (R. 34). Upon receipt of such an order at Worcester, it was handled in the same way as other orders received there (R. 64).

Summary of Argument

The Illinois tax is an occupation or privilege tax imposed on the seller for the privilege of selling tangible personal property at retail, and is measured by gross receipts from such sales. As applied in this case the tax was levied on sales made by petitioner, a Massachusetts corporation, pursuant to orders accepted in Massachusetts, where the goods were manufactured by petitioner, and from which state the goods were shipped, f. o. b. Worcester, Massachusetts, to customers in Illinois. The court below recognized that the sales in question were interstate transactions, but upheld the tax on such sales because petitioner also had an office and warehouse in Illinois from which local sales were made. Liability for the tax on such local sales from its Illinois office and warehouse was admitted and is not in issue here, but petitioner contends that the Illinois tax cannot be validly levied upon the interstate sales which were separate and distinct from the local sales made in Illinois.

Under this Court's decision in *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944), the Illinois tax is clearly invalid as applied to petitioner's sales which were consummated in Massachusetts, even though the goods were shipped to customers in Illinois. The fact that petitioner had an office and warehouse in Illinois from which it did an intrastate business is constitutionally irrelevant to the power of Illinois to tax the separate and distinct sales which admittedly constituted interstate transactions. The state may tax the local business but it cannot measure such tax by unapportioned gross receipts from interstate commerce.

Whether the Commerce Clause creates an area of free trade which immunizes interstate transactions from direct taxation by the states, or whether it simply prevents the risk of multiple state taxes on the same interstate transac-

tions, it must be abundantly clear that a tax like the Illinois tax, which is both a direct tax on interstate transactions and may be duplicated by several states, is unconstitutional. The tax here is laid on the transaction of sale itself, not upon some local incident that precedes or follows the sale; and it is applied to the unapportioned gross receipts from such interstate sale. And the tax is of such a nature that if the identical tax should be imposed in another state, interstate sales between Illinois and such other state would be subjected to twice the sales tax burden that intrastate sales would bear.

The Illinois tax cannot be justified as the substantial equivalent of a use tax. The tax is imposed upon the seller, who is not required or authorized to collect the tax from the buyer. In its nature, operation and effect, the Illinois tax is substantially different from a use tax and cannot be sustained upon the constitutional principles applied in the use tax cases. The present case is also distinguishable from other cases where state taxes have been upheld as applied to local activities or incidents related to interstate sales.

As the statute is construed by the court below, the Illinois tax does not apply to sales made by an out-of-state seller to Illinois customers in cases where the seller has no place of business in Illinois. The tax therefore discriminates against some interstate transactions in favor of others, of the very same nature. Such discrimination itself amounts to a regulation of interstate commerce and provides an additional ground for holding the Illinois tax unconstitutional.

ARGUMENT

I

The Illinois Retailers' Occupation Tax is imposed upon the seller for the privilege of engaging in the business of making retail sales, which in this case are admittedly interstate transactions, and is measured by unapportioned gross receipts from such sales.

The Illinois Retailers' Occupation Tax is "imposed upon persons engaged in the business of selling tangible personal property at retail in this state at the rate of * * * two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales". The tax is imposed on the seller; the seller is not authorized or required to collect the tax from the buyer; and no duty rests on the buyer to pay the tax. *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. (2d) 144 (1943).

The Supreme Court of Illinois has construed the Act as imposing "an occupation tax upon a class of vendors * * * measured by the gross receipts from their sales". *People's Drug Shop, Inc.* v. *Moysey, supra.* That court has also described the tax as "a tax on the privilege of engaging in the business of selling tangible personal property to purchasers for use or consumption". *People ex rel. Herlihy Mid-Continent Co.* v. *Nudelman*, 370 Ill. 237, 18 N. E. (2d) 225 (1938).

The qualifying words "in this state" as used in the section imposing the tax have been construed by the Supreme Court of Illinois as referring to the location of the "occupation" which is taxed rather than to the place where the taxable sales occur. *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136, 48 N. E. (2d) 514 (1943). If an occupation of selling at retail is carried on within the state, the tax is "to be measured upon the gross receipts of all sales

regardless of where the sales were made, provided they were made in the business of an occupation located within this state." *Standard Oil Co.* v. *Department of Finance*, 383 Ill. at 143.

As construed by the Supreme Court of Illinois the tax does not apply to sales made by an out-of-state seller, where the goods are shipped to a buyer in Illinois and where the seller has no place of business in Illinois. *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316, 50 N. E. (2d) 505 (1943); *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345, 50 N. E. (2d) 509 (1943). Nor is the tax applied to the case of an out-of-state seller who ships goods to customers in Illinois, even if the seller has Illinois sales offices through which orders are solicited. *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363, 50 N. E. (2d) 508 (1943).[1]

As the Act is construed and applied by the court below in the present case, petitioner, a Massachusetts corporation, which has an office and warehouse in Illinois, from which local sales are made, is subject to the tax not only with respect to sales made from such local office and warehouse but also with respect to separate and distinct interstate sales. In the case of such interstate sales, the orders were accepted by petitioner in Massachusetts, the goods were manufactured by petitioner in Massachusetts and were shipped from Massachusetts, f.o.b. Worcester, to purchasers in Illinois. The court below recognized that such sales were interstate transactions, saying that "There is no doubt that we are dealing with interstate commerce in the present case" (R. 97), but it held nevertheless that the Illinois

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[1] In the present case the court below assumed that the only activity of the local offices in the *Allis-Chalmers* case was the solicitation of orders in Illinois (R. 99). Actually, it appears from the opinion in the *Allis-Chalmers* case that the company had paid taxes on local sales in Illinois, which were not in dispute. 383 Ill. at 364, 50 N. E. (2d) at 508.

Retailers' Occupation Tax upon petitioner could be validly measured by the entire gross receipts from such interstate commerce.

II

The Illinois tax is clearly invalid under this Court's decision in McLeod v. Dilworth.

An occupation tax imposed on the seller and measured by gross receipts from interstate sales can be no stronger, constitutionally, than a tax levied in so many words directly upon such sales. In cases where occupation taxes have been measured by unapportioned gross receipts from interstate commerce, this Court has considered such taxes invalid as direct taxes on such commerce. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650 (1936); *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939).

Although the states have been permitted to levy use taxes[2] and sales taxes[3] in connection with certain local aspects of interstate sales, it has been the uniform doctrine of this Court that a state tax upon an interstate sale itself, as distinguished from some local incident of the sale, is unconstitutional. *Crew Levick Co.* v. *Pennsylvania*, *supra*; *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince* v. *Henneford*, *supra*; *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327 (1944); *Freeman* v. *Hewit*, 329 U. S. 249 (1946). See *Sonneborn Brothers* v. *Cureton*, 262 U. S. 506, 515 (1923). This was emphasized in *McLeod* v. *Dilworth*, where this Court held an Arkansas sales tax invalid as applied to sales, made by a seller in

[2] See proposition IV, *infra*, where the use tax cases are discussed and distinguished.

[3] *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and similar cases are discussed and distinguished under proposition V, *infra*.

Tennessee, of goods shipped to customers in Arkansas. The decision in the *Dilworth* case is clearly controlling here.

In *McLeod* v. *Dilworth*, *supra*, a seller in Tennessee sent solicitors into Arkansas to solicit orders for goods from Arkansas buyers. The solicitors had no authority to accept any orders but were required to forward them to the home office in Tennessee where they were accepted or rejected. When an order was accepted, the goods were shipped to the buyers in Arkansas, f.o.b. Memphis, Tennessee. This Court held that the Arkansas sales tax could not be constitutionally levied on these sales, because the sales took place outside of Arkansas and such a tax would, therefore, be an unconstitutional burden on interstate commerce.

In the *Dilworth* case, this Court said that the Arkansas tax imposed an unconstitutional burden on interstate commerce because it sought to reach sales "consummated in Tennessee for the delivery of goods in Arkansas". Addressing itself to this point the Court said:

> "Orders for goods come to Tennessee through solicitation in Arkansas by travelling salesmen domiciled in Tennessee, by mail or telephone. But no matter how an order is placed it requires acceptance by the Memphis office, and on approval the goods are shipped from Tennessee. Title passes upon delivery to the carrier in Memphis, and collection of the sales price is not made in Arkansas. In short we are here concerned with sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." 322 U. S. at 328.

These are the precise facts of the instant case. All orders for the Massachusetts sales of the Norton Company were accepted by the petitioner in Massachusetts. Title passed upon delivery of the goods to the carrier f.o.b. Worcester, Massachusetts, and all billing and collection of the purchase price was done at Worcester, Massachusetts. In

short, paraphrasing the words of the Court in the *Dilworth* case, "we are here concerned with sales made by a Massachusetts vendor that are consummated in Massachusetts for the delivery of goods in Illinois".

There are two possible distinctions between the *Dilworth* case and the case at bar. One of the factual differences between the cases furnishes an additional argument against the Illinois tax in the present case and makes the present case a stronger one against the Illinois tax, than the facts of the *Dilworth* case afforded against the Arkansas tax. The other factual difference is legally irrelevant—a difference but not a legal distinction.

In the *Dilworth* case the seller sent solicitors into Arkansas to solicit sales. In the present case the court below has found as a fact that petitioner had no salesmen in Illinois and solicited no sales there (R. 95-96). There is, therefore, an even more remote connection between the Massachusetts sales and the tax imposed by Illinois in the present case than there was between the Tennessee sales and the Arkansas tax in the *Dilworth* case.

In the *Dilworth* case the seller sent solicitors into Arkansas to solicit orders for sales. The seller did not, however, have a local office in Arkansas, while petitioner does maintain a local office in Illinois. This factual difference is legally irrelevant. The local office in Illinois was engaged solely in making local sales to Illinois buyers as to which petitioner has paid the Illinois tax and raises no constitutional question. It is true that in some cases orders for the Massachusetts sales were routed through the Illinois office. However, the Illinois office had no authority to accept or reject such orders; it acted as a purely passive conduit for transmitting these orders to the home office in Massachusetts, where they were accepted or rejected. (R. 9)

Any possible distinction between the *Dilworth* case and the case at bar, upon the ground that petitioner had a local

office in Illinois, is clearly negatived by the cases holding that the fact that a corporation does an intrastate business in a state affords no justification for taxing its interstate business. In *Cooney* v. *Mountain States Telegraph Co.*, 294 U. S. 384 (1935), Mr. Chief Justice Hughes, speaking for the Court, said (at p. 392):

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitutes such commerce or the privilege of engaging in it. And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination."

See also *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910); *Cudahy Packing Company* v. *Hinkle*, 278 U. S. 460 (1929); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917) (involving an annual mercantile license tax measured by a percentage of gross receipts, held invalid as applied to the receipts of a firm engaged in local, intrastate commerce as well as interstate or foreign commerce).[4]

It is true that in *Felt and Tarrant Manufacturing Co.* v. *Gallagher*, 306 U. S. 62 (1939); *Nelson* v. *Sears Roebuck &*

[4] Following this Court's decision in the *Dilworth* case, the Arkansas Supreme Court had to consider a question as to the validity of the Arkansas sales tax as applied to sales made by a Louisiana branch of an Arkansas firm to customers in Arkansas under circumstances where the orders were accepted at the Louisiana branch and shipped from there to customers in Arkansas. Although the seller's principal place of business was in Arkansas and it did an extensive intrastate business in Arkansas, from its Arkansas stores, the sales made by the Louisiana branch to Arkansas customers were held not taxable. *State ex rel. Commissioner of Revenue* v. *Hollis & Company*, 209 Ark. 455, 190 S. W. (2d) 986 (1945). The court recognized that the case was ruled by this Court's decision in the *Dilworth* case.

Company, 312 U. S. 359 (1941); and *Nelson* v. *Montgomery Ward*, 312 U. S. 373 (1941), this Court held that a state could require an out-of-state seller to collect and remit to the state a *use* tax[5] in connection with goods sold to buyers within the taxing state, and in these cases the seller had a local agent in the taxing state. However, the Court has made it clear that the presence of a local agent within the state had nothing to do with the matter. Thus, in the case of *General Trading Company* v. *State Tax Commission*, 322 U. S. 335 (1944), the Court sustained the imposition of that kind of obligation on a seller who had no local office within the taxing state and the Court was very careful to point out explicitly that the presence of a local office had nothing to do with the legality of the tax. The Court said (at p. 338):

> "And the fact that in the *Sears Roebuck* and *Montgomery Ward* cases the interstate vendor also had retail stores in Iowa, whose sales were appropriately subjected to the sales tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the state."

III

The Illinois tax is unconstitutional because it is a direct tax upon unapportioned gross receipts from interstate commerce and also because it subjects such commerce to the threat of multiple state taxation.

Whether the Commerce Clause inhibits a state from imposing a direct tax upon interstate sales [*Freeman* v. *Hewit*, 329 U. S. 249 (1946); *McLeod* v. *J. E. Dilworth Company*, 322 U. S. 327 (1944)] or whether it simply protects such sales from the risk of multiple state taxes on the same

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[5] The differences between a use tax and a sales tax are discussed under proposition IV, *infra*.

transaction [*J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938)], it is abundantly clear that a state tax which is both a direct tax upon an interstate sale and subject to duplication by other states is unconstitutional. Since the Illinois tax here in question is both, it is clearly unconstitutional.

Recent decisions of this Court have emphasized and reiterated the basic principle "that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force created an area of trade free from interference by the States". *Freeman* v. *Hewit*, 329 U. S. at 252. See also *Joseph* v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422, 433 (1947); *McLeod* v. *J. E. Dilworth Company*, 322 U. S. at 330-331; *Puget Sound Stevedoring Co.* v. *Tax Commission of the State of Washington*, 302 U. S. 90, 94 (1937). Applying this principle in *Freeman* v. *Hewit*, this Court held invalid, as a direct tax upon interstate commerce, a state gross receipts tax as applied to the proceeds of an interstate sale. The Court said (at p. 287): "The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the state taxing power ever since *Fargo* v. *Michigan*, 121 U. S. 230, and *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326."

In holding the tax invalid in *Freeman* v. *Hewit*, the Court pointed out that such an impediment on interstate commerce could not be justified either on the ground that the tax is applied without discrimination to local sales within the taxing state as well as to interstate sales, or upon the ground that multiple state taxation is not involved. With reference to the non-discriminatory nature of the tax in that

case, the Court said that a state "cannot justify what amounts to a levy upon the very process of commerce across state lines by pointing to a similar hobble on its local trade." 329 U. S. at 254. The Court recognized that in order to make interstate commerce pay its way the states are permitted to impose other kinds of taxes, "apart from taxing the very sale", and it explained that such permitted taxes "are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause." 329 U. S. at 256.[6]

In some cases the Court has held state taxes invalid under the Commerce Clause, because the taxes were of such a nature as to subject interstate transactions to the risk of multiple taxation by every state which such commerce touches. *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939); *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938). In applying this principle as a basis for holding a state tax on interstate sales invalid, in

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[6] The Court relied on *Freeman* v. *Hewit* in the later case of *Central Greyhound Lines* v. *Mealey*, 334 U. S. 653, 663 (1948), where a state tax was held invalid as applied to *unapportioned* gross receipts from interstate transportation. In that case it was recognized that the tax might be upheld if *fairly apportioned* (as on a mileage basis) to receipts from business done within the state. Compare *Interstate Oil Pope Line Co.* v. *Stone*, 337 U. S. 662 (1949), involving a state tax measured by the gross receipts from the operation of a pipe line wholly within the state. Four justices held the tax valid, even though the transportation was considered a part of interstate commerce, because there was no attempt to tax activities outside the state and no other state could repeat the tax. One Justice concurred solely on the ground that the transportation involved was intrastate commerce. Four Justices dissented on the ground that the tax was invalid as a direct tax on interstate commerce, even though the taxable receipts were derived from transportation wholly within the state.

J. D. Adams Manufacturing Co. v. Storen, supra, this Court said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids." 304 U. S. at 311.

In cases applying the multiple tax principle, it is clear that the actual existence of a similar tax in other states which such commerce touches need not be shown in order to invalidate the tax. "Unlawfulness of the burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." *Gwin, White & Prince* v. *Henneford*, 305 U. S. at 440. And cf. *Freeman* v. *Hewit*, 329 U. S. at 256.

That the Illinois tax as applied in this case is a direct tax on interstate commerce should require no argument. The tax is levied on sales that are admittedly interstate transactions (R. 97) and is measured by gross receipts from such interstate sales. Moreover, the tax is imposed upon the occupation of making interstate sales, that is, it is a levy exacted for the very privilege of engaging in interstate commerce.

The Illinois tax clearly involves the danger of multiple taxation. Since the statute was amended in 1941, the Supreme Court of Illinois has held that it applies to "all sales regardless of where the sales were made." See the explanation under proposition I, *supra*. No explicit provision in the

Illinois statute confines the tax to an intrastate incident of an interstate sale susceptible to taxation by Illinois alone. Nor does the construction of the statute by the Illinois court impose such a limitation. The tax is measured by the gross receipts from interstate sales and there is no attempt to apportion the tax to any activities in Illinois. Nor, as the present case demonstrated, does the tax actually depend on a local incident of an interstate sale since all the essential elements of the interstate sales in question occurred outside of Illinois. If Illinois can tax sales which are entirely consummated outside of Illinois like the Massachusetts sales of petitioner in this case, it is evident that the state where the sales took place may also tax them.

Viewed as an occupation tax, the Illinois tax presents perhaps even greater possibilities for multiple taxation. Although the Supreme Court of Illinois, in speaking of the 1941 amendment, which removed the limitation in the statute which had limited the tax to sales made in Illinois, said that the tax was "to be measured upon the gross receipts of all sales regardless of where the sales were made, provided that they were made in the business of an occupation located within this State",[7] it seems clear from the way in which the court below applied the statute in the present case that the proviso is no real limitation at all. It would seem from the opinion of the Court in *Standard Oil Co.* v. *Department of Finance*, *supra*, that it could not possibly have construed its statute as applying to the Massachusetts sales of the petitioner here, since such sales were in no way related to the occupation of making local sales carried on by petitioner in Illinois. However, the Illinois Supreme Court did construe its law to permit an occupation tax on sales actually made in another state. If Illinois can impose a tax on the

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[7] *Standard Oil Co.* v. *Department of Finance*, 383 Ill. 136, 143, 48 N. E. (2d) 514, 517 (1943).

occupation of making sales in Massachusetts, surely Massachusetts, where the occupation of making these sales is actually carried on, can impose a tax on the same transaction.

IV

The Illinois tax cannot be sustained as the substantial equivalent of a use tax.

The court below relied to some extent upon decisions in which this Court sustained the validity of the Iowa use tax as applied to goods purchased by Iowa buyers from out-of-state sources, and further upheld a provision of the Iowa statute requiring the out-of-state seller to collect the use tax from the buyer and remit to the State of Iowa. *Nelson* v. *Sears, Roebuck & Company*, 312 U. S. 359 (1941); *Nelson* v. *Montgomery Ward*, 312 U. S. 373 (1941); *General Trading Company* v. *State Tax Commission*, 322 U. S. 335 (1944). And it is only fair to point out that some of the Justices dissented from the decision in *McLeod* v. *Dilworth*, 322 U. S. 327 (1944), on the ground that a use tax could have been imposed by Arkansas (the buyer's state) under the facts disclosed in that case, and that since there was no substantial difference between the practical operation of a use tax and the Arkansas sales tax, the Arkansas tax should have been sustained. In the opinion of the Court in the *Dilworth* case it was said, however, that the "answer [to the contention] is that Arkansas has chosen not to impose such a use tax." 322 U. S. at 330. The Court continued:

> "A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments on different transactions and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. * * *"

In the present case there is no doubt that Illinois has deliberately chosen a tax imposed upon the seller on account of its occupation of making sales, and not a use tax imposed upon the buyer on account of use within the State of Illinois. Not only does the Illinois statute impose the tax upon the seller with reference to the transaction of sale, which in this case is interstate, but it does not require or authorize the seller to collect the tax from the buyer, and no duty is imposed upon the buyer to pay the tax to the seller or to the state. *People's Drug Shop, Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. (2d) 144 (1943). The practical situation is entirely different from what it would be if a use tax were involved. Moreover, the difference between a sales tax and a use tax goes deeper than the legal incidence of the tax since the two taxes may have a different effect on interstate commerce.

If Illinois had chosen to supplement its Retailers' Occupation Tax with a use tax, the use tax would be imposed with respect to goods which compete with petitioner's products and which are sold to Illinois purchasers by petitioner's competitors who have no place of business in Illinois and who escape payment of the Retailers' Occupation Tax.[8] At least in that situation petitioner would not be subject to the burdensome discrimination against it and in favor of such competitors.[9] Moreover, the actual burden of a use tax would have a greater tendency to fall on the purchaser than would an occupation or sales tax imposed on the seller. The record here shows that petitioner actually absorbed the Illinois tax and did not pass it on or shift the burden to its Illinois customers (R. 11-13). "The prices charged an Illinois customer were the same as those charged to customers in other states for the same article at the same time"

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[8] An Illinois use tax, but not the Illinois sales tax, would also fall upon goods purchased outside the state which Illinois purchasers would themselves bring into Illinois for use there.

[9] See the discussion under proposition VI, *infra*.

(R. 12-13). If Illinois law imposed a use tax on Illinois purchasers and required the seller to collect it as agent for the state, the additional charge for the tax would be less likely to meet with customer resistance than would be the case if the seller tried to shift the burden of an occupation or sales tax imposed upon him, by charging Illinois customers more than the price it charges customers in other states. That is particularly true in a situation like the present where petitioner's competitors, who have no place of business in Illinois, do not have to pay the Illinois tax on sales to their Illinois customers.[10] It is manifest that the Illinois tax is not the substantial equivalent of a use tax.

V

The Berwind-White and similar cases are distinguishable.

In the court below respondent relied heavily upon the decision of this Court in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940). In that case this Court upheld the validity of a New York City "sales tax" as applied to sales of coal which the seller mined in Pennsylvania and shipped across New Jersey for delivery to buyers in New York City. In the case of all sales as to which the New York tax was sustained, the sales contracts were entered into in New York City and deliveries were made within New York City. 309 U. S. at 44. The tax in question was laid "upon purchasers for consumption of tangible personal property." 309 U. S. at 42. The tax was fixed at "two per centum upon the amount of the receipts from every sale in the City of New York," "sale" being defined in the Act as "any transfer of title or possession, or both * * * for a considera-

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[10] *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316, 50 N. E. (2d) 505 (1943); *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345, 50 N. E. (2d) 509 (1943); *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363, 50 N.E. (2d) 508 (1943).

tion * * *." The taxing Act provided that the tax "shall be paid by the purchaser to the vendor for or on account of the City." 309 U. S. at 42-43. It required the vendor to charge the tax to the purchaser separately from the sales price and it made the vendor liable, as an insurer, for payment to the City. In the event of non-payment to the seller, the Act required the buyer to file a return and pay the tax to the City Comptroller.

This Court held that the tax involved in that case was not invalid under the Commerce Clause because it was "conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession." 309 U. S. at 43-44. The Court considered that the taxable event under the Act was "delivery of goods within the state upon their purchase for consumption," and that this was a "local activity," which occurred after the interstate journey had ended. 309 U. S. at 49, 58.

As pointed out before, the Illinois tax is imposed upon the seller and not the buyer.[11] Nor does the statute specify as the taxable event some local activity occurring within Illinois. The provision originally limiting the tax to sales occurring within the state was removed by amendment in 1941. *Standard Oil Co.* v. *Department of Finance, supra.* As construed and applied by the Supreme Court of Illinois in the case at bar, the statute imposes a tax on sales occurring in Massachusetts, under circumstances where orders were received and accepted in Massachusetts, the goods were shipped f.o.b. Worcester, Massachusetts, so that title passed

[11] The Bureau of Internal Revenue recognizes that the Illinois tax is imposed on the seller (I.T. 2783, XIII-1 C.B. 54), and that the New York tax involved in *Berwind-White* is imposed on the purchaser (I.T. 2902, XIV-2 C.B. 67), with a resulting difference in treatment under the Federal income tax law.

in Massachusetts, and the goods were delivered to the carrier on behalf of the buyer in Massachusetts.

The principle of the *Berwind-White* case is limited to the situation involving an entirely different kind of tax—a tax on the purchaser for consumption—and to the situation where the taxable event specified in the taxing Act is a local activity occurring within the taxable state after interstate commerce has ended. It has never been applied to a tax on sales, measured by the gross selling price, where all of the essential elements of the sale occurred outside the taxing state although the goods were shipped into the taxing state pursuant to the contract of sale. *McLeod* v. *J. E. Dilworth Co.*, 322 U. S. 327.[12]

The limitations on the *Berwind-White* case are clearly shown by the cases involving the application of the Indiana Gross Income Tax to gross receipts from interstate sales. In *Freeman* v. *Hewit*, 329 U. S. 249 (1946), an Indiana resident sold securities through a broker in New York. This Court held that the Indiana tax could not be applied constitutionally to the receipts from the sale because it impinged upon the interstate sale itself and was not limited to any local intrastate incident of the sale. In a similar situation the same result was reached in *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307 (1938). On the other hand, in *Department of Revenue* v. *Wood Preserving Co.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), it was held that the income from the sales involved in these cases was taxable because

[12] In the *Dilworth* case this Court distinguished the *Berwind-White* case and the two cases decided together with *Berwind-White*, viz., *McGoldrick* v. *Felt and Tarrant Manufacturing Co.* and *McGoldrick* v. *A. H. DuGrenier, Inc.*, 309 U. S. 70. The Court said that the decision in *Berwind-White* controlled the two other cases because the relevant factors were the same. 322 U. S. at 329. *Berwind-White* was also distinguished in *Freeman* v. *Hewit*, 329 U. S. at 257.

the tax impinged on local intrastate activities which occurred in Indiana, such for example as the consummation of the contract of sale in Indiana, delivery to the buyer in Indiana and passage of title to the goods in Indiana. Where, however, the tax is imposed directly upon an interstate sale and not upon some local intrastate transaction it is unconstitutional whether it is imposed by the seller's state (*Freeman* v. *Hewit, supra*) or the buyer's state (*McLeod* v. *Dilworth, supra*).

Since the present case is clearly distinguishable from the *Berwind-White* and similar cases, it seems unnecessary to discuss such cases at greater length. But it does seem appropriate at this point to restate certain fundamental principles as to which there is no disagreement, although in some of the cases referred to under this heading, these principles may not have been considered as fully as they should have been in relation to the facts presented.

Under the Federal Constitution a state is free, *after* interstate property has come to rest in the state, to impose upon it any burden which it imposes on property originating within the state. On such property the state may impose a property tax, a use tax, a sales tax or any other burden. This is a corollary of the principle that the state where the property is produced and from which it is sold may impose any sort of tax it wishes to impose *before* the property ceases to be a part of the mass of property in the seller's state and takes on interstate implications. To maintain a proper balance between the rights of the states in local matters and the constitutional guarantee of freedom of interstate commerce, great care must be exercised by this Court to see that, at each end of an interstate transaction, the incidents which are local and disconnected from the interstate commerce be carefully distinguished from those which are essentially an integral part of such commerce. The task is not always a simple

one and sometimes fine lines must be drawn to make certain that what purports to affect only a local activity is not actually a regulation of interstate commerce. If the Court is not careful in drawing such lines, no proper division is possible between what is and what is not permitted to the state. If merely because an integral phase of an interstate transaction takes place within a state that state is permitted to regulate it as though it were not a part of the interstate transaction, the whole concept of freedom of interstate commerce from state interference becomes meaningless.[13]

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[13] It is clear from the opinion in *Nippert* v. *Richmond*, 327 U. S. 416 (1946), that the Court realizes that if any wide scope be given to the concept justifying a tax because it is on some local incident of an interstate transaction, freedom of such commerce from state interference will be wholly destroyed. Mr. Justice Rutledge, speaking for the Court, said (at p. 423):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a state could not be segregated by an act of mental gymnastics and made the fulcrum of the tax. All interstate commerce takes place within the confines of the states and necessarily involves 'incidents' occurring within each state through which it passes or with which it is connected in fact. And there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate and distinct' or 'local,' and thus achieve its desired result."

VI

The Illinois taxing act is unconstitutional for the further reason that it attempts to regulate interstate commerce by discriminating against some interstate sales in favor of others.

The Supreme Court of Illinois has construed the Retailers' Occupation Tax Act as *not* requiring a tax on interstate sales made by out-of-state sellers to Illinois customers where such sellers have no local office in Illinois. *Ex-Cell-O Corp.* v. *McKibbin*, 383 Ill. 316; *Ayrshire Patoka Collieries Corp.* v. *Nudelman*, 383 Ill. 345.[14] These cases were distinguished by the court below in the present case and the tax was held to apply to interstate sales made by petitioner, since petitioner did maintain a local office and warehouse in Illinois, even though the interstate sales in question were separate and distinct from the local business handled by the Illinois office and warehouse. The effect of the Act as thus construed is to discriminate against one type of interstate commerce in favor of another without any rational basis for the discrimination.

Generally cases of discrimination by a state against interstate commerce have been presented in situations where the discrimination was against interstate commerce and in favor of local commerce. Such discrimination has been uniformly held to be bad. Cf. *Nippert* v. *Richmond*, 327

[14] At the same time the Court held the tax inapplicable to sales made by an out-of-state seller to Illinois customers under circumstances where the seller maintained two sales offices in Illinois, through which orders were solicited, and where the seller also made some local sales on which it admitted its liability for the tax. *Allis-Chalmers Mfg. Co.* v. *Wright*, 383 Ill. 363. Although the court below attempted to distinguish the *Allis-Chalmers* case from the case at bar, it did so upon the assumption that the only local activity of the Allis-Chalmers Co. was the solicitation of orders through its sales offices in Illinois. It is difficult to reconcile the actual result in the *Allis-Chalmers* case with the decision in the present case.

U. S. 416 (1946). Whatever may be the rule where a mere burden is placed on interstate commerce, if it is apparent that state action produces discrimination against interstate commerce in favor of local commerce, no further inquiry is necessary to determine the invalidity of the state action. Such discriminatory action unquestionably constitutes a prohibited regulation of such commerce under the Federal Constitution and there has been no tendency on the part of the courts to sustain such action.

On the basis of the principles underlying these decisions, it must be clear beyond question that it is equally a violation of the Commerce Clause for a state to discriminate in favor of some interstate sales against other interstate sales. The type of such possible discriminations which first comes to mind is discrimination in favor of goods coming in from one state as compared with goods coming from another. But it should be just as clear that a state cannot constitutionally discriminate against interstate sales made by persons having an office in the state as compared with the same kind of sales made in the same manner by one not having an office in the state and vice versa. If any local incident of any interstate sale, as, for example, the making of delivery within the state, should be held to be taxable by the state, it should be clear that the state should not be free under the commerce clause to tax such incident of one interstate sale and not to tax the same incident of another such sale. If it were necessary as some members of the Court have felt, to permit a tax on local incidents of an interstate sale in order to make sure that interstate commerce pays its way, that would certainly afford no basis for sustaining a state tax which discriminates against portions of interstate commerce by taxing one portion and permitting another portion to remain free of the tax, as does the Illinois tax here in question.

Conclusion

There can be no doubt that upon the authority of this Court's decisions, the Illinois tax as applied here is unconstitutional, as a direct burden on interstate commerce itself, since it is measured by unapportioned gross receipts from such commerce, and is also of such a nature as to be susceptible of multiplication by other states, with the result that it subjects such commerce to the risk of a cumulative burden that intrastate commerce does not bear. This Court's decision in *McLeod* v. *Dilworth* is definite and clear authority for the invalidity of this tax. In order to sustain the Illinois tax here, the Court would not only have to overrule the *Dilworth* case, but it would have to repudiate the basic reasoning of all the cases on the taxation of interstate sales. Moreover, the Illinois statute as construed and administered is unconstitutional because it discriminates against some interstate sales in favor of others. It is submitted that the decision of the Supreme Court of Illinois is erroneous and should be reversed.

Respectfully submitted,

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APPENDIX

ILLINOIS RETAILERS' OCCUPATION TAX

(Ill. Rev. Stat. 1949, chap. 120, par. 440 et seq., Vol. 2, p. 778)

An Act in relation to a tax upon persons engaged in the business of selling tangible personal property to purchasers for use or consumption. (Approved June 28, 1933, as amended. L. 1933, p. 924.)

Be it enacted by the people of the state of Illinois, represented in the General Assembly:

441. Tax imposed on business of selling tangible personal property at retail. Sec. 2. A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this State at the rate of three per cent (3%) of the gross receipts from such sales of tangible personal property made in the course of such business prior to July 1, 1941, and two per cent (2%) of ninety-eight per cent (98%) of the gross receipts from such sales after June 30, 1941. However, such tax is not imposed upon the privilege of engaging in any business in interstate commerce or otherwise, which business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State. As amended by act approved May 29, 1941. L. 1941, Vol. 1, p. 1079.

441b. Revocation of certificate of registration. Sec. 2b. The Department may, after notice and a hearing as provided herein, revoke the certificate of registration of any person who violates any of the provisions of this Act. . . .

445. Erroneous payment of tax, penalty or interest—Credit or refund. Sec. 6. If it shall appear, after claim therefor filed with the Department, that an amount of tax or penalty has been paid which was not due under the provisions of this Act, whether as the result of a mistake of fact or an error of law, except as hereinafter provided, then the Department shall issue a credit memorandum to the person who made the erroneous payment, or in the event that such person shall have died or become incompetent, to such person's legal representative, as such. The amount of

such credit memorandum shall be credited against any tax or penalty due or to become due under this Act from the person who made the erroneous payment. If no tax or penalty is due and no proceeding is pending to determine whether such person is indebted to the Department for tax or penalty or either, the credit memorandum so issued may be assigned and set over by the lawful holder thereof, subject to reasonable rules of the Department, to any other person who is subject to the provisions of this Act, and the amount thereof applied by the Department against any tax or penalty due or to become due under this Act from such assignee. * * *

445a. Claims for credit. Sec. 6a. Claims for credit shall be prepared and filed upon forms provided by the Department. * * *

445b. Tentative determination of claim—Notice—Hearing—Review. Sec. 6b. As soon as practicable after a claim for credit is filed the Department shall examine the same and determine the amount of credit to which the claimant or the taxpayer's legal representative, in the event that the taxpayer shall have died or become incompetent, is entitled and shall, by its Notice of Tentative Determination of Claim, notify the claimant or his legal representative of such determination, which determination shall be prima facie correct. Proof of such determination by the Department may be made at any hearing before the Department or in any legal proceeding by a photostatic copy of the Department's record relating thereto, in the name of the Department under the certificate of the Director of Revenue. Such photostatic copy shall, without further proof, be admitted into evidence before the Department in any legal proceeding and shall be prima facie proof of the correctness of the Department's determination, as shown therein. If such claimant, or the legal representative of a deceased or incompetent taxpayer, shall within twenty (20) days after the Department's notice of Tentative Determination of Claim, file a protest thereto and request a hearing thereon, the Department shall give notice to such claimant, or the legal representative of a deceased or incompetent taxpayer, of the time and place fixed for such hearing, and shall hold a hear-

ing in conformity with the provisions of this Act, and pursuant thereto shall issue its Final Determination of the amount, if any, found to be due as a result of such hearing, to such claimant, or the legal representative of a deceased or incompetent taxpayer. The Department's Final Determination may be reviewed by the proper Circuit or Superior Court, in the same manner, within the same time, upon the same terms and conditions and to the same extent, as provided by Section 12 of this Act. Appeals from final orders or judgments of such courts shall be taken as in said Section 12 is provided. Added by act approved July 21, 1947. L. 1947, p. 1458.

451. Review of determination of Department. Sec. 12.

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The Circuit or Superior Court of the County wherein the taxpayer has his principal place of business, or of Sangamon County in those cases where the taxpayer does not have his principal place of business in this State, shall have power to review all final administrative decisions of the Department in administering the provisions of this Act.

* * * * * * *

Appeals from all final orders and judgments entered by the Circuit or Superior Court upon review of the Department's determination in any case shall be taken directly to the Supreme Court by either party to the proceeding, and shall be governed by the rules applicable to civil cases appealed to said Supreme Court. The remedy herein provided for appeal shall be exclusive.

* * * * * * *

452. Violations—Penalties. Sec. 13. Any person engaged in the business of selling tangible personal property at retail in this State who fails to make a return, or to keep books and records as required herein, or who makes a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions of this Act, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who signed

a fraudulent return made on behalf of such corporation, or any itinerant vendor, as herein defined, who after notice fails to file the bond required by Section 12½ of this Act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than twenty-five ($25.00) dollars nor more than five thousand ($5,000.00) dollars, or be imprisoned in the county jail for not less than one (1) month nor more than six (6) months, or be both so fined and imprisoned, in the discretion of the court.

Any person who violates any provision of Section 2a of this Act is guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five ($25.00) dollars nor more than five hundred ($500.00) dollars, or be imprisoned in the county jail not more than six (6) months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person engaged in business in violation of said Section 2a shall constitute a separate offense.

453. Title of Act—Tax additional. Sec. 14. This Act shall be known as the "Retailers' Occupation Tax Act" and the tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision threof.